(3)

No. 87-1424

In The
Supreme Court of the United States
October Term, 1987

COMMONWEALTH OF VIRGINIA, *ex rel.*
STATE BOARD OF ELECTIONS,

Petitioners,

v.

WILLIE B. KILGORE, DORIS McCONNELL, PATSY BURCHETT, KATHERINE JONES McCLELLAND, FAYE OWENS, ROGER ADAMS, EVELYN BACON, PHILLIP CHEEK, the COUNTY OF LEE, VIRGINIA, the COUNTY OF SCOTT, VIRGINIA, the REPUBLIC INSURANCE COMPANY and the COMPASS INSURANCE COMPANY,

Respondents.

BRIEF IN OPPOSITION OF ROGER ADAMS, EVELYN BACON, PHILLIP CHEEK and COUNTY OF LEE, VIRGINIA TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT FILED HEREIN BY COMMONWEALTH OF VIRGINIA

HENRY S. KEULING-STOUT
Counsel of Record
KEULING-STOUT, P.C.
401 Wood Avenue, East
P. O. Box 400
Big Stone Gap, VA 24219
(703) 523-1676
Counsel for Roger Adams, Evelyn Bacon, Phillip Cheek and the County of Lee, Virginia

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or call collect (402) 342-2831

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QUESTIONS PRESENTED

Does the First Amendment's prohibition against political patronage discharges from government employment apply where the evidence establishes that extreme political animosity and party antipathy may actually thwart the proper functioning of a small government office?

Should this Court certify to the Virginia Supreme Court a pure question of state law where the court of appeals' interpretation of that state law is clearly wrong and is disrupting well-settled state/local government relationships?

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Respondents, Roger Adams, Evelyn Bacon, Phillip Cheek and the County of Lee, Virginia, do not think a writ of certiorari should be granted as to the second question presented in the Commonwealth of Virginia's petition.

REFERENCE TO OPINIONS

The respondents, Roger Adams, Evelyn Bacon, Phillip Cheek and the County of Lee, Virginia refer this Court to the same opinions and orders designated on page 2 of the petition.

JURISDICTION

The order of the court of appeals denying plaintiffs'/appellees' petition for rehearing and suggestion for rehearing en banc was entered on November 19, 1987. (Petition of Commonwealth, A-25). This Court may take jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Pertinent constitutional provisions and state statutes at issue here are reproduced as Appendix D at A-70 of the appendix to the petition filed by the Commonwealth of Virginia. There is in addition Code of Va. § 2.1-526.8(E) reproduced as Appendix A at page A-1 of the appendix of this brief in opposition, and Virginia Supreme Court Rule 5:42 reproduced as Appendix B at page A-2.

STATEMENT OF THE CASE

Roger Adams, Evelyn Bacon, Phillip Cheek and the County of Lee, Virginia wish to supplement petitioner's statement of the case. The question as to whether the defendant election officials were employees of the state or of their localities was not a dispute which existed from the outset. As far as Lee County, the electoral board members and registrar were concerned, the question of their status as state or local employees was not addressed until January 9, 1986, the date of the evidentiary hearing prior to District Court Judge Kiser's April 28, 1986 opinion. (Petition of Commonwealth, A-51 and 52). The accurate statement as to Lee County is that the insurance carrier for Lee County has thus far provided counsel in a case where, until April 28, 1986, there was no judicial determination as to whether the electoral board members and registrar were Lee County or Commonwealth of Virginia employees.

Contrary to petitioner's assertion, both the district and circuit court reviewed ample and available Virginia law and applied it to the specific facts of these cases in determining that the electoral board members and the registrars were for the purposes of these cases state employees. The circuit court (Petition of Commonwealth, A-14 to A-20) and the district court (Petition of Commonwealth, A-59 to A-65) carefully set out the reasons the electoral board members and the registrars were state employees.

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REASONS FOR GRANTING THE WRIT, BUT ONLY AS TO QUESTION I

I. THE COURT OF APPEALS' REFUSAL TO CONSIDER WHETHER POLITICAL ANIMOSITY MAY JUSTIFY A PATRONAGE RELATED DISCHARGE FROM GOVERNMENT IGNORES THE DEVELOPING LAW AND CREATES INCONSISTENCY AMONG THE CIRCUITS ON THIS ISSUE.

Respondents Adams, Bacon, Cheek and Lee County, Virginia agree with the argument set forth on pages 8 to 11 of the Commonwealth of Virginia's petition for a writ and adopt that argument as their own.

II. THE COURT OF APPEALS' HOLDING IN THIS CASE THAT LOCAL ELECTION OFFICIALS ARE STATE EMPLOYEES HAS CREATED A NOVEL AND UNSUPPORTED EXCEPTION TO STATE LAW, AND IS DISRUPTING WELL-SETTLED STATE/LOCAL GOVERNMENT RELATIONSHIPS.

This second reason the Commonwealth of Virginia sets out as supporting a writ should not be considered by the Court for the following reasons:

1. For a question to be certified to the Virginia Supreme Court it must be a question of Virginia law which is determinative in a proceeding in this Court. The petitioner, Commonwealth of Virginia, has not asked this Court to determine in this proceeding the second question. The petitioner wants the second question determined by the Supreme Court of Virginia. The petitioner, Commonwealth of Virginia, is requesting this Court, on its behalf, to get the Supreme Court of Virginia to review question

two. Such a procedure is prohibited by the language of Supreme Court Rule 5:42(b): "No party litigant in the foregoing courts may file in the (Virginia) Supreme Court a petition or motion for certification."

Even if the Supreme Court of Virginia were to take the second question and find the electoral board members and registrar local rather than state employees, that ruling would in no way be determinative of any issue raised by the petitioner in this proceeding in this Court. The petitioner has not asked this court to determine whether the electoral board members and registrar are state or local employees and the result of that inquiry is not determinative to the first of the two questions raised by the petitioner in this proceeding. Contrast, *Virginia v. American Booksellers Association, Inc.*, No. 86-1034 (decided Jan. 25, 1988), 56 U.S.L.W. 4113 (Jan. 26, 1988) wherein this Court did certify a determinative question of Virginia law to the Supreme Court of Virginia. In *American Booksellers* the certification procedure was not available to the lower courts and the questions certified were essential to the remaining constitutional questions which this Court had to decide.

2. Virginia Supreme Court Rule 5:42 became effective on April 1, 1987. The circuit court opinion in this case is dated October 1, 1987. The circuit court had available to it but did not use the Virginia Supreme Court certification procedure.

3. A major consideration governing this Court's review on certiorari is the presence of a federal question. Rule 17, Rules of the United States Supreme Court. The

petitioner's second reason for the writ does not raise or present a federal question.

4. The circuit court held petitioner to be immune (Eleventh Amendment) from money damages precisely because the electoral board members and registrar were under the facts and circumstances of these cases, state employees. The federal question of Eleventh Amendment money damages immunity was determined to the *benefit* and not to the detriment of petitioner.

5. The district court and circuit court carefully reviewed the Virginia statutory and case law and applied the facts of these cases to that law. The circuit court agreed with the district court in concluding that in these cases the electoral board members and registrar should be considered state employees. The petitioner is now requesting this Court to order the circuit court to request the Supreme Court of Virginia to review the same law and the same facts with hopes that the Supreme Court of Virginia will come up with the opposite result.

6. *Hardy v. Board of Supervisors of Dinwiddie County*, 387 F.Supp. 1252 (E.D. Va. 1975) cited by petitioner is inapposite. *Hardy* does not essentially deal with an electoral board but with an admittedly local Dinwiddie County, Virginia, board of supervisors.

7. On March 16, 1950 the Attorney General of Virginia issued an opinion which the petitioner continues to overlook. That opinion in pertinent part reads as follows:

> Members of the local electoral board are constitutional officers appointed by State courts for the purpose of performing certain duties in connection with elections. They exercise an important function of

> the State government, affecting not only the county in which their duties are performed, but the State as a whole. This is emphasized by the enactment of Section 24-25 of the Code by which the legislature imposed upon the State Board of Elections the duty of supervising and co-ordinating the work of the local electoral board and empowered it to make such rules and regulations as are conductive to the proper functioning of such electoral boards. Furthermore, the State Board of Elections is authorized to institute proceedings for the removal of any member of an electoral board who fails to discharge his duty . . .
>
> I am of the opinion, therefore, that since the maintenance of local electoral boards is a State function and its members are appointed for a statewide purpose, they must be considered State officers.

1949-1950 Report of the Attorney General at 69.

8. *Crane v. State of Texas,* 759 F.2d 412 (5th Cir. 1985) found officials to be local and liable when acting contrary to state law and policy. When officials act in conformance with state law and policy, as is the situation in the cases before this Court, *Familias Unidas v. Briscoe,* 619 F.2d 319 (5th Cir. 1980), cited in *Crane,* is the proper legal authority. In *Familias* the defendant officials acted in conformance with a state statutory scheme found later to be unconstitutional. The court found the officials not liable under § 1983. *Id.* at 430 n. 19; 432 n. 21.

9. The petitioner tries to argue on page 12 of the petition that Virginia Code § 24.1-32 as amended in 1986 makes electoral board members and registrars local employees. For at least three reasons, this argument on behalf of the petitioner is misplaced. First, the petitioner

has only stated a portion of the amendment. The complete sentence reads as follows:

> Members of electoral boards, officers of election, general registrars, and assistant registrars shall be deemed, for all purposes, *except as otherwise specifically provided by state law and including rules and regulations of the State Board of Elections,* to be employees of the respective cities or counties in which they serve. (*Emphasis added.*)

The very issue in these cases is that because of specific statutory provisions, and because of the State Board of Elections' Rules and Regulations, and because of the active involvement of both the General Assembly and the State Board, the members of the electoral boards, and the general registrars are state employees. The amendment to § 24.1-32, therefore, simply states that if they are not otherwise determined to be state employees, they are local employees. Secondly, the 1986 amendment was not effective until July 1, 1986. Third, if the petitioner is using the 1986 amendment to § 24.1-32 as an argument that the petitioner is not willing to accept the responsibility for the conduct generated by its partisan oriented statutory scheme then that argument does not make any sense at all in light of the Va. Code § 2.1-526.8(E) which states that the petitioner is setting up an insurance plan to provide financial coverage for persons who find themselves in just such a predicament as do the Lee County and Scott County electoral board members and registrars.

10. The petition for writ of certiorari is not the proper vehicle for the petitioner to raise problems it may be having because of the circuit court's rulings in these cases. Any "serious dilemma for state-local relations"

is not a matter properly before this Court. Such alleged dilemmas must be framed in lawsuits, supported by evidence and first litigated in courts other than this one.

———o———

CONCLUSION

For the foregoing reasons the petition for writ of certiorari of the Commonwealth of Virginia should be denied as to the second question presented and granted as to the first question presented.

Respectfully submitted,

ROGER ADAMS,
EVELYN BACON,
PHILLIP CHEEK
AND
COUNTY OF LEE, VIRGINIA

HENRY S. KEULING-STOUT
Counsel of Record
KEULING-STOUT, P.C.
401 Wood Avenue, East
P. O. Box 400
Big Stone Gap, VA 24219

APPENDIX

§ 2.1-526.8. *Insurance plan for public liability.*

E. The insurance plan established pursuant to this section shall provide protection against professional liability imposed by law for damages resulting from any claim made against a local electoral board, electoral board member or general registrar for acts or omissions of any nature while acting in an authorized governmental or proprietary capacity and in the course and scope of employment or authorization, subject to the limitations of such insurance plan. (1980, c. 488; 1982, c. 318; 1986, cc. 554, 558.)

K. CERTIFICATION OF QUESTIONS OF LAW

Rule 5:42. Certification Procedures.

(a) *Power to Answer.*—The Supreme Court may in its discretion answer questions of law certified to it by the Supreme Court of the United States, a United States court of appeals for any circuit, a United States district court, or the highest appellate court of any state or the District of Columbia. Such answer may be furnished, when requested by the certifying court, if a question of Virginia law is determinative in any proceeding pending before the certifying court and it appears there is no controlling precedent on point in the decisions of the Supreme Court or the Court of Appeals of Virginia.

(b) *Method of Invoking.*—This Rule may be invoked only by an order of one of the courts referred to in section (a). No party litigant in the foregoing courts may file in the Supreme Court a petition or motion for certification.

(c) *Contents of Certification Order.*—A certification order shall set forth:

(1) the nature of the controversy in which the question arises;

(2) the question of law to be answered;

(3) a statement of all facts relevant to the question certified;

(4) the names of each of the parties involved;

(5) the names, addresses, and telephone numbers of counsel for each of the parties involved;

(6) a brief statement explaining how the certified question of law is determinative of the proceeding in the certifying court; and

(7) a brief statement setting forth relevant decisions, if any, of the Supreme Court and the Court of Appeals of Virginia and the reasons why such decisions are not controlling.

(d) *Preparation of Certification Order.*—The certification order shall be prepared by the certifying court, signed by the presiding justice or judge, and forwarded to the Supreme Court by the clerk of the certifying court under its official seal. The Supreme Court may require the original or copies of all or of any portion of the record before the certifying court to be filed with the certification order, if, in the opinion of the Supreme Court, the record or portion thereof may be necessary in answering the certified question. The Supreme Court may in its discretion restate any question of law certified or may request from the certifying court additional clarification with respect to any question certified or with respect to any facts.

(e) *Notification of Acceptance or Rejection.*—The Supreme Court, in its discretion, may decide whether to answer any certified question of law. The Supreme Court will notify the certifying court and counsel for the parties of its decision to accept or to reject any certified question of law. A notice accepting a question will include a briefing schedule and, if oral argument is permitted by the Supreme Court, a tentative date and the length of time allowed for such argument.

(f) *Revocation of Acceptance.*—The Supreme Court, in its discretion, may revoke its decision to answer a certified question of law at any time. Upon deciding to revoke, the Supreme Court will notify the certifying court and counsel for the parties of its action.

(g) *Costs of Certification.*—Fees and costs shall be the same as in civil appeals docketed in the Supreme Court and shall be paid as ordered by the certifying court in its order of certification.

(h) *Briefs.*—The form, length, and time for submission of briefs shall comply with Rules 5:26 through 5:34 *mutatis mutandis.*

(i) *Opinion.*—A written opinion of the Supreme Court stating the law governing each question certified will be rendered as soon as practicable after the submission of briefs and after any oral argument. The opinion will be sent by the clerk under the seal of the Supreme Court to the certifying court and to counsel for the parties and shall be published in the Virginia Reports.

Cross reference.—As to certification of questions of law, see Va. Const., Art. VI, § 1.

Effective date.—This rule was adopted Jan. 16, 1987, and became effective Apr. 1, 1987.